Supreme Court, U. S.
FILED
AUG 25 1975
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 74-1542

UNION ELECTRIC COMPANY,
Petitioner,
v.
ENVIRONMENTAL PROTECTION AGENCY.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

PETITIONER'S REPLY
to
MEMORANDUM FOR THE RESPONDENT

WILLIAM H. FERRELL
314 North Broadway
St. Louis, Missouri 63102
Counsel for Petitioner

STEWART W. SMITH, JR. and
KEEFE, SCHLAFLY, GRIESEDIECK & FERRELL
Of Counsel

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 74-1542

UNION ELECTRIC COMPANY,
Petitioner,
v.
ENVIRONMENTAL PROTECTION AGENCY.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

PETITIONER'S REPLY
to
MEMORANDUM FOR THE RESPONDENT

In this reply we direct our attention solely to respondent's claim that the petition for certiorari should be denied with respect to questions 2, 3 and 4 (Pet. 2-3). Each of questions 2 and 3 refer to constitutional matters, and they have been combined by respondent into a single question (No. 3) in its Memorandum, p. 2. In the context of this particular case, we see nothing wrong with that combination.

Supreme Court Rule 23.1(c) says that "The statement of a question presented will be deemed to include every subsidiary question fairly comprised therein." While we have stated the constitutional questions separately in our petition, we believe that it could be strongly contended that, at least to some extent, they may be "fairly comprised" within the first question, which involves the interpretation of an Act of Congress. Certainly a citation of cases is not necessary to support the proposition that a statute will be construed in a constitutional, rather than an unconstitutional, manner when reasonably possible. Thus the process of interpreting a statute may involve constitutional considerations, and in this case we think it does.

Most lawyers in the United States believe that a person is constitutionally entitled at some time to judicial review of administrative action which seriously affects his person or property.

For the purpose of an assumption only, let us suppose that this Court holds (1) that Section 307(b)(1) of the Clean Air Act, as added, may constitutionally be interpreted to prevent petitioner from raising technological, economic and impossibility factors in a proceeding thereunder, since (2) the due process requirement of the 5th Amendment is satisfied inasmuch as these matters may be raised in an enforcement proceeding. Frankly we would think that the proposition stated in (2) above is a part of the ~~decision~~ decision and not *dicta*.

As a matter of fact the preceding paragraph sets forth the thrust of the 7th Circuit's decision in *Indiana & Michigan Electric Company v. Environmental Protection Agency*, 509 F(2) 839. That was a Section 307(b)(1) proceeding wherein the Court held that such matters could not be raised in a 307(b)(1) case, but that they could be raised in an enforcement proceeding, and thereby the constitutional requirement of due process would be met (p. 847 of opinion). We respectfully submit that the 7th Circuit did not think this was *dicta*, that Federal District Judges in that Circuit will not think it is *dicta* and that the 7th

Circuit will not, when an enforcement proceeding in fact comes before it, think that its earlier statement is *dicta*. Thus the Solicitor General is about the only person who thinks it is (n. 8, p. 8 of his petition for certiorari in the *St. Joe* case—No. 74-1650).

Getty Oil Co. v. Rucklehaus (3rd CCA), 467 F(2) 349 was neither a Section 307(b)(1), nor an enforcement, proceeding. The Court said (p. 356) "The Constitution requires an opportunity at a meaningful time and in a meaningful manner for a hearing appropriate to the nature of the case." After full consideration the 3rd Circuit said that questions of economic hardship or lack of compelling necessity may be raised in a section 307(b)(1) proceeding only (p. 357). Three years later in the *St. Joe* case, 508 F(2) 743 the 3rd Circuit did not think that its earlier statement in the *Getty* case was *dicta* (see p. 747 of the *St. Joe* opinion). And neither did the 7th Circuit think the *Getty* statement was *dicta* in its *Indiana & Michigan Electric Co.* decision, since it specifically declined to follow the *Getty* decision (509 F(2) at p. 845).

The 6th Circuit's decision in *Buckeye Power Co. v. EPA*, 481 F(2) 162, is something of an anomaly. The Court there held (1) that the Administrative Procedure Act requires participation by interested parties prior to the Federal promulgation of an implementation plan *and* (2) that claims of technological infeasibility, high-cost benefit and resource unavailability may be raised in an enforcement proceeding (pp. 168-9 and 173 of the opinion). A reading of those pages of the opinion clearly indicates that the 6th Circuit did not think that its statement about an enforcement proceeding was *dicta*. We submit that Federal District Judges in the 6th Circuit will not consider it as *dicta* and that the 6th Circuit will not consider it as *dicta* when the matter later comes before it in an enforcement proceeding.*

---

* In the *St. Joe* petition for certiorari (No. 74-1650, n. 7 on p. 8) the Solicitor General says that the 6th Circuit's statement is *dicta*. We again respectfully suggest that he is alone in that opinion.

Turning now to the instant case, on page 8 of its memorandum, respondent says that the Eighth Circuit's decision merely precludes judicial review of economic and technological infeasibility claims *at this time*. But that is not what the Eighth Circuit said. That Court in fact said that such claims may never be subjected to judicial review (Pet. A 22-23).

Further on page 8 of its memorandum respondent says that "Congress has great latitude in limiting the jurisdiction of (Federal) courts and specifying the questions they may adjudicate." We agree with this statement, but that is not the situation here. The Eighth Circuit said that Courts can *never* consider economic and technological infeasibility claims. Consequently Congress, according to the Eighth Circuit, has completely withdrawn these questions from the judiciary and placed *final* and *absolute* power to resolve them in a Federal Administrative Agency.

On page 9 of its memorandum, respondent implies that economic and technological issues might be heard in an enforcement proceeding, and it says that the Eighth Circuit did not hold otherwise. But the Eighth Circuit did not say that. To the contrary that Court said that such issues may not be heard in any judicial proceeding—and that includes an enforcement proceeding.

We respectfully submit that in an enforcement proceeding at some future date within the states comprising the Eighth Circuit, the Federal District Judges will not consider the Court of Appeals' statement as *dicta*. And we further submit that when the decision of such a District Judge is appealed to the Eighth Circuit Court of Appeals, that Court will not consider its earlier statement in the *Union Electric* case as *dicta*. Then we will be back where we started—trying to get the matter before this Court.

We agree and sympathize with respondent's desire for a ruling by this Court which will enable the EPA "to perform properly its statutory responsibilities" (P. 7 of its memorandum). But we also think that the persons subject to such "responsibilities" are entitled to know their rights. We respectfully submit that the constitutional questions are a significant and integral part of this case and that they should be, and in fact hardly can help being, considered in its resolution.

The fourth question, which was posed by respondent on page 2 of its memorandum and discussed on pages 9 and 10, (namely whether approval of an implementation plan is invalid if the plan's requirements are not necessary to attain or maintain national ambient air standards) was not mentioned as a question in our petition for certiorari. Consequently we do not think it is now, or ever was, presented to this Court.

Our fourth (and respondent's fifth) question relates to the provision in the Missouri implementation plan concerning sulfur dioxide emissions. The Eighth Circuit's decision on that question was based on statements in Report No. 91-1196 issued September 17, 1970 by the Senate Committee on Public Works accompanying S. 4358. Since that report is about the only Congressional statement concerning the judicial review provisions of Section 307(b)(1) of the Clean Air Act, as amended, we do not know how counsel or this Court can skirt around it in deciding the instant case. In the *Oliato* case, 515 F(2) 654, which respondent says endorses the *Union Electric* decision on this question, the District of Columbia Court of Appeals says (pp. 665-6):

> "While we are not as sure as the Eighth Circuit that this reading of Section 307 flows inexorably from the *Senate Report*, we think this holding makes good sense and is consistent with the statutory scheme."

And finally the Court relies on its "inherent powers" in deciding this matter of statutory construction (P. 666 of opinion).

For the reasons stated above and in our petition for certiorari, we pray that it be granted as to all questions presented therein, not only as to the first question as respondent requests.

Respectfully submitted

WILLIAM H. FERRELL
314 North Broadway
St. Louis, Missouri 63102
Counsel for Petitioner

STEWART W. SMITH, JR.

and

KEEFE, SCHLAFLY, GRIESEDIECK
& FERRELL
Of Counsel